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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PARNELL COLVIN,)	CASE NO. 2:20-cv-01765-APG-EJY
)	
Plaintiff,)	PLAINTIFF'S RESPONSE TO
)	DEFENDANT'S FOURTH MOTION IN
vs.)	LIMINE TO EXCLUDE TESTIMONY AND
)	EVIDENCE OF DEFENDANT'S ALLEGED
)	MISCONDUCT AGAINST OTHER
M.J. DEAN CONSTRUCTION, INC.,)	EMPLOYEES
)	
Defendant.)	
)	Trial: March 27, 2023
)	Time: 9:00 a.m.
)	Judge: Honorable Andrew Gordon
)	

Plaintiff PARNELL COLVIN ("Plaintiff" or "Colvin") submits this Response to Defendant M.J. Dean Construction, Inc's ("Defendant" or "M.J. Dean Construction") Fourth Motion in Limine to exclude testimony and evidence of Defendant's alleged misconduct against other employees.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

This is a race-based employment discrimination action. Plaintiff Colvin is black. His legal claims of (1) retaliation, (2) discrimination regarding overtime opportunities, (3) harassment and (4) negligent training and supervision will be heard at trial. He seeks lost wages and compensatory damages for pain and suffering, including humiliation, embarrassment and emotional distress relative to the above legal claims. He also seeks attorney's fees and costs.

M.J. Dean Construction fourth motion seeks to exclude testimony and evidence of Defendant's alleged misconduct against other employees.

In order to prove a hostile work environment the conduct must be sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create a racially abusive or hostile work environment. Because the inquiry focuses on the workplace environment as a whole, a racially hostile work environment may exist even if some of the hostility was directed at other workers.

Further an issue exists in the case as to whether Defendant was negligent in its training, supervision and hiring which might include looking at its misconduct against other employees.

This being the case Defendant's motion to exclude testimony and evidence of alleged misconduct against other employees is not well taken and should be summarily denied.

II.

**THIS COURT MAY EXCLUDE EVIDENCE IN ADVANCE OF
TRIAL BY WAY OF AN IN LIMINE MOTION**

The Court has authority to grant a motion in limine, in advance of trial, which excludes inadmissible evidence, as well as any and all reference by the parties, attorneys and witnesses to the inadmissible evidence. *Luce v. U.S.*, 469 U.S. 38, 41 (1984), 16 Fed. R. Evid. Serv. 833 (1984); *U.S. v. Lachman*, 48 F.3d 586, 590-94, 41 Fed. R. Evid. Serv. 339 (1st Cir. 1995).

1 In addition, Federal Rules of Evidence 103(c) and 104(c) allow the court to hear and
 2 determine the question of the admissibility of evidence outside the presence or hearing of the jury.
 3 *Williams v. Board of Regents of University System of Georgia*, 629 F.2d 993, 999-1001 (5th Cir.
 4 1980).

5 III.

6 **TESTIMONY AND EVIDENCE OF DEFENDANT’S ALLEGED MISCONDUCT** 7 **AGAINST OTHER EMPLOYEES IS RELEVANT AND THEREFORE SHOULD NOT BE** 8 **EXCLUDED FROM INTRODUCTION AT TRIAL AND AT ANY RATE SHOULD NOT** 9 **BE EXCLUDED AT THIS POINT WITHOUT KNOWING EXACTLY WHAT THE** 10 **EVIDENCE IS**

11 Federal Rule of Evidence 401 provides that “evidence is relevant if (a) it has any tendency
 12 to make a fact more or less probably than it would be without the evidence; and (b) the fact is of
 13 consequence in determining the action.” *Huddleston v. U.S.*, 485 U.S. 681, 682-92, 25 Fed. R.
 14 Evid. Serv. 1 (1988); *U.S. v. Brandon*, 17 F.3d 409, 443-46 (1st Cir. 1994) (rejected on other
 15 grounds by, *U.S. v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998)). Evidence must be excluded
 16 where it is not relevant to matters at issue. *Arlio v. Lively*, 474 F.3d 46 (2nd Cir. 2007) (evidence
 17 regarding a prior arbitration was irrelevant and should have been excluded); *U.S. v. Edwards*, 631
 18 F.2d 1049, 1051 (2d Cir. 1980) (trial judge had discretion to exclude two witnesses that were
 19 offered by the defendant as irrelevant and collateral.) Finally, “The court may exclude relevant
 20 evidence if its probative value is substantially outweighed by a danger of one or more of the
 21 following: unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting
 22 time, or needless presenting cumulative evidence.” *Federal Rule of Evidence 403*.
 23

24 Here relevant evidence in this case is any evidence that tends to show that a racially hostile
 25 work environment existed at M.J. Dean Construction. That may include testimony or other
 26 evidence showing misconduct based on his race against Colvin or other employees.

27 *See McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1117 (9th Cir. 2004)-“if racial hostility
 28

1 pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility was
2 not directly targeted at the plaintiff”.

3 Where racial slurs have been directed at a minority race which plaintiff is a member,
4 similar slurs directed at other minorities may contribute to the overall hostility of the working
5 environment. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2nd Cir. 2000).

6 Plaintiff must show the conduct was so offensive “as to render the workplace hostile not
7 only for him but for any reasonable employee who likewise was a bystander rather than a target of
8 the harassment. *Walker v. Mueller Industries, Inc.*, 408 F.3d 328, 331 (7th Cir. 2005); *Barnett v.*
9 *Whirlpool Corp.*, 556 F.3d 502, 511-513 (6th Cir. 2009).

10 Finally motions in limine are improper where it is not known exactly what evidence will be
11 presented at trial. Often the trial judge must wait until the context of the trial before the judge can
12 assess the factual context of the evidence and determine the admissibility of it. Actual testimony
13 often defies pretrial predictions of what a witness will say on the stand. *U.S. v. Cline*, 188 F. Supp.
14 2d 1287, 1291, 59 Fed. R. Evid. Serv. 99 (D. Kan. 2002), aff’d 349 F.3d 1276 (10th Cir. 2003).

15 “[T]he trial court must consider the evidence in light of the entire case and determine
16 whether it provides a basis for reasonable inferences related to plaintiff’s claim.” *Cummings v.*
17 *Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001).

18 Plaintiff intends to call all of the witnesses listed as Plaintiff’s witnesses (and possibly
19 some of the Defendant’s witnesses) in the Joint Pretrial Order and intends to ask most if not all of
20 them about Defendant’s misconduct against other employees.

21 Thus if anything the Court should wait to see what evidence is presented at trial with
22 respect to Defendant’s misconduct against other employees and thus deny Defendant’s motion in
23 limine at this point.
24

25 IV.

26 CONCLUSION

27 For all the reasons stated above, Plaintiff requests that this Court *not* exclude testimony
28

1 and evidence of Defendant's alleged misconduct against other employees at this point but wait
2 until the evidence is presented at trial.

3
4 DATED: 3/10/2023

LAW OFFICES OF MICHAEL P. BALABAN

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6 BY: /s/ Michael P. Balaban

Michael P. Balaban, Esq.

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11 **CERTIFICATE OF SERVICE**

12 I hereby certify that pursuant to FRCP Rule 5(b)(3) and LR IC 4-1(a), a true and correct
13 copy of the foregoing document was electronically served via the Court's CM/ECF electronic filing
14 system to the following persons on March 10, 2023:
15

16
17 Martin A. Little, Esq.

Robert L. Rosenthal, Esq.

18 HOWARD & HOWARD ATTORNEYS PLLC

Attorneys for Defendant

19
20 /s/ Michael P. Balaban

Michael P. Balaban